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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

CHIP STEAK CO., INC. and VAO L. CHENEY,
AS PRESIDENT, *Petitioners,*

VS.

EARL A. BUTZ, SECRETARY OF AGRICULTURE, M. E. CHRISTOPHERSON, U.S.D.A. REGIONAL DIRECTOR, R. A. MOODY, U.S.D.A. DEPUTY DIRECTOR, R. E. GOERTZ, U.S.D.A. OFFICER IN CHARGE OF THE SAN FRANCISCO CIRCUIT, LEON G. BROIDY and A. J. ENGLISH, U.S.D.A. MEAT INSPECTORS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for Ninth Circuit, in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The decision of the U.S. District Court is reported in *Chip Steak, Inc. v. Hardin,* 353 F.Supp. 438 (N.D. Cal. 1973) and is printed in Appendix B hereto. The per curiam opinion of the U.S. Court of Appeal for the Ninth Circuit, *not yet reported,* appears in the Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1974. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether under the Federal Meat Inspection Act, as amended, meat inspectors of the U.S. Department of Agriculture can routinely take meat samples from owners without making payment.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Federal Meat Inspection Act as amended by the Wholesome Meat Act of 1967 (81 Stat. 584, 21 U.S.C. §601 et seq.) are:

21 U.S.C. §642(a)
21 U.S.C. §680
21 U.S.C. §695
21 U.S.C. §606

The regulation involved is 9 CFR 318.9.

The pertinent statutes and regulation are set forth in the Petition.

STATEMENT OF THE CASE

Petitioners are Chip Steak Co., Inc., of Oakland, California, and Vao L. Cheney, President of Chip Steak Co., Inc. Respondents are the Secretary of Agriculture and his representatives.

Chip Steak Co., Inc., processor of meat food products, is engaged in interstate commerce under the supervision of the United States Department of Agriculture within the authority of the Federal Meat Inspection Act, as amended. All meats entering the premises of Chip Steak Co. for processing have been marked "Inspected and Passed" by a U.S.D.A. inspector at a slaughtering plant (R.T. 36-37, 43-44).*

On August 19, 1970, a U.S.D.A. meat inspector routinely took meat samples during the processing of commutated beef steaks at Chip Steak Co., Inc., without making payment for them. (C.R. 77, 113).* Chip Steak Co. immediately took its own samples of the same beef steaks and had them analyzed by the Needham Fat Analysis Machine. Within 20 minutes after sampling, the Needham Machine indicated that the meat samples were substantially below 30% in fat content. (C.R. 77-78, 113).

Meanwhile, the U.S.D.A. meat inspector mailed his sample from Oakland to the U.S.D.A. Laboratory in

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*"R.T." refers to the Reporter's Transcript and "C.R." refers to the Court Record filed in the Court of Appeal.

San Francisco, California. On August 28, 1970, that Laboratory conducted a routine test on the official meat samples. The U.S.D.A.'s test indicated that the meat samples contained 35.1% fat, whereas the maximum permitted by law is 30% (C.R. 32).

On September 1, 1970 U.S.D.A. officials detained the lot from which said samples had been taken. The approximately 747 pounds of beef steaks were already packaged for distribution to consumers (C.R. 33; R.T. 33-34). The lot was placed in a retaining cage on the company's premises under lock control by the U.S.D.A. officials.

Mr. Cheney, in light of his evidence that the U.S.D.A.'s test was incorrect, made several requests that the U.S.D.A. allow the detained articles to be retested by a U.S.D.A. Laboratory using the official method in order to determine the actual fat content (R.T. 92). The U.S.D.A.'s official letter of refusal, dated January 11, 1971, stated that the articles would not be retested and that they "can only be reworked and/or relabeled in order to be released and meet our Inspection Requirements". (C.R. 84; R.T. 101-102).

On January 11, 1971, plaintiffs filed an action for declaratory relief and a mandatory injunction to release the products (C.R. 1, 78).

On or about January 19, 1971, U.S.D.A. supervising inspector Broidy entered Chip Steak Co. to take samples from said packaged articles in the retaining cage without court approval (C.R. 79, 113). Petitioner Cheney informed Mr. Broidy that he was taking these samples without his (Mr. Cheney's) consent and with-

out making the payment required under 21 U.S.C. §642(a). Mr. Broidy took packaged meat samples against Mr. Cheney's protest and without making payment (C.R. 79-113).

On February 9, 1971 Petitioner Cheney learned that the U.S.D.A. had conducted a reanalysis of meat samples and that the results showed a fat content of 27.1% (C.R. 79, 113). Moreover, a U.S.D.A. certified private laboratory test cited a fat content of 26.29% (C.R. 33).

Six weeks later the lot was still locked in its cage. On March 24, 1971 Petitioners filed a supplemental complaint alleging that the article had not been released and that U.S.D.A. officials had taken packaged meat samples from said article without payment to the owner as required by 21 U.S.C. §642(a). (C.R. 20-25). Only thereafter did Mr. Broidy finally unlock the retaining cage and remove "retention tags" from said article (C.R. 79, 113). The meat product had been detained for a total of 198 days without cause.

On April 27, 1971, respondents filed a motion to dismiss since the article had been released to petitioners.

On May 14, 1971, petitioner Cheney sent a letter to a U.S.D.A. official requesting payment of the fair market value for samples taken during routine inspection as required by 21 U.S.C. §642(a) of the Meat Inspection Act (C.R. 142).

On June 2, 1971, B. M. Christopherson, Director of the Western Region, U.S.D.A., replied by letter that "until such time as we are otherwise advised we will

continue to collect samples from your establishment in the usual manner" that is, without payment (C.R. 143).

On October 4, 1971, the District Court granted the motion to dismiss the complaint with leave to amend (C.R. 72).

On November 5, 1971, petitioners filed their Third Amended Complaint, which is the basis of this action (C.R. 102-107) for declaratory relief on the issue of payment of sample by the United States (C.R. 212).

On January 30, 1973, the U.S. District Court denied declaratory and injunctive relief to Petitioners (C.R. 212). On September 23, 1974, the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment "for the reasons stated in the opinion of the district court . . ."

At present representatives of the Secretaary of Agriculture continue to take meat samples from Chip Steak Co., Inc. without making payment. The "non-payment" policy is given in regulation 9 CFR 318.9 and is contrary to statutes 21 U.S.C. §§ 642(a) and 695.

ARGUMENT ON REASONS FOR GRANTING THE WRIT

A. THE LOWER COURTS' DECISIONS ALLOWING MEAT INSPECTORS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE TO TAKE SAMPLES FROM OWNERS WITHOUT PAYMENT ARE INCONSISTENT WITH THE STATUTORY CONSTRUCTION AND CONGRESSIONAL INTENT OF THE MEAT INSPECTION ACT, AS AMENDED.

The U.S. Supreme Court in *Ferguson v. Skrupa,* 372 U.S. 726, at *730,* said:

> "We returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

Congress enacted the Meat Inspection Act[1] requiring the cost of meat inspection to be borne by the United States government with the stated goal of insuring "uncompromising inspection".[2] Recently, Congress amended this Act[3] to state specifically that federal representatives, upon notice to members of the meat industry under federal meat inspection, are allowed "to take reasonable samples of their inventory upon payment of the fair market value therefor".[4] The decisions of the lower courts allows the taking of samples within the meat industry without payment by the United States. By reviewing the specific statutes and legislative history of the Meat Inspection Act, as amended, against the memorandum of decision of the U.S. District Court, it could not be more clear that the lower courts did "substitute their social and economic beliefs for the judgment of legislative bodies", in this case both houses of Congress, who enacted the Meat Inspection Act, as amended.

1. Statute 21 U.S.C. §642(a) authorized the taking of samples by the federal government only upon payment of the fair market value.

Routine sample-taking by a U.S.D.A. meat inspector from inventory of a meat processor must be pursuant

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[1]21 U.S.C. §71, 34 Stat. 1260 (1907).

[2]21 U.S.C. §695, 62 Stat. 344 (1948) Infra, page 11, 1948 U.S. Code Cong. Service, p. 1706 at 1711.

[3]21 U.S.C. §601 et seq., Pub. L. No. 90-201, 81 Stat. 584 (1967).

[4]21 U.S.C. §642(a).

to a specific authorizing statute. The only statute authorizing U.S.D.A. meat inspectors to take samples under the Meat Inspection Act is given in 21 U.S.C. §642(a):

> "(a) The following classes of persons, firms and corporations shall keep such records as will fully and correctly disclose all transactions involved in their businesses; and all persons, firms, and persons subject to such requirements shall, at all reasonable times, upon notice by a duly authorized representative of the Secretary, afford such representative access to their places of business and opportunity to examine the facilities, inventory, and records thereof, to copy all of such records, and *to take reasonable samples of their inventory upon payment of the fair market value therefor*—(Emphasis added)
>
> (1) Any persons, firms, or corporations that engage, for commerce, in the business of slaughtering any cattle, sheep, swine, goats, horses, mules, or other equines, or preparing, freezing, packaging, or labeling any carcasses, or parts of carcasses, of any such animals, for use as human food or animal food;
>
> (2) Any persons, firms, or corporations that engage in the business of buying or selling (as meat brokers, wholesalers or otherwise), or transporting in commerce, or storing in or for commerce, or importing, any carcasses, or parts or products of carcasses, of any such animals;"

21 U.S.C. §642(a) authorizes the taking of samples by U.S.D.A. meat inspectors upon payment from the in-

ventory of slaughtering plants to the retail stores, including the meat processing plants.[5]

There is no other provision in the Meat Inspection Act authorizing the taking of any samples with or without payment, and thus it would seem that there were no grounds for dispute, that any reasonable person could see that payment for samples was required. Yet the lower court's memorandum of decision states at page x of Appendix B:

> "The issue presented here is essentially one of statutory construction: whether Congress, in enacting §642, intended the language contained therein requiring payment for samples of 'inventory' to apply to U.S.D.A. sampling of meat food products in the course of inspections under 21 U.S.C. §606."

The "issue" presented by the lower court could have been readily resolved by taking note of the express language contained in §642(a). Section 642(a) requires payment for samples taken from any establishment engaged in "the business of slaughtering" "or preparing, freezing, packaging" or in "the business

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[5]Memorandum of Decision states at page xiii of Appendix B:

> "The term 'inventory' is defined neither in the statute nor in USDA regulations. We can reasonably assume, however, that Congress used the term having in mind its plain, ordinary meaning in the context of an on-going business: i.e., stock in trade available for sale in the ordinary course of business."

Webster's Third New International Dictionary defines "inventory" as: 1. an itemized list of current assets; or . . . b(1): a list or schedule of raw materials, supplies, work in progress and finished goods on hand as of a given date . . . [or] 3a: the quantity of goods or materials on hand . . ."

of buying and selling" or "transporting in commerce" or "storing in or for commerce" or of "importing" any animal or meat product. Section 606 does nothing to detract from this requirement, since it does not even mention sample-taking. It only authorizes the summary destruction of all meat marked "Inspected and condemned" and directs that other meat be labelled "Inspected and passed".[6]

2. Statute 21 U.S.C. §695 requires and its legislative history shows intent that the cost of federal meat inspection be borne by the United States government.

More than two decades ago Congress experimented with a policy of requiring meat plants to pay the cost of their own federal inspection. After a one-year trial (1947-48) Congress repudiated the policy, so that now 21 U.S.C. §695 states:

> "The cost of inspection rendered on or after July 1, 1948, under the requirements of laws relating to federal inspection of meat and meat food products shall be borne by the United States except the cost of overtime pursuant to §394 of Title 7."

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[6] 21 U.S.C. § 606:

"For the purposes hereinbefore set forth the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as 'Inspected and passed' all such products found to be not adulterated; and said inspectors shall label, mark, stamp, or tag as 'Inspected and condemned' all such products found adulterated, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary may remove inspectors from any establishment which fails to so destroy such condemned meat food products: . . ."

In the course of amending the Meat Inspection Act, Congress in effect reinforced this policy by incorporating the above-quoted statutory provision, as is, in the Wholesome Meat Act of 1967. The reason Congress retained this policy was explained in the prior legislative history:

> "In summary, it seems to the [congressional] committee that the principles involved here are plain and impelling reasons for the enactment of the bill:
>
> 1) the protection of the health and welfare of the people of the United States is a proper function of this government;
>
> 2) the inspection of meat products to insure its purity and wholesomeness is a proper exercise of that function;
>
> 3) such inspection is obviously for the benefit of the consumer in general—the public—rather than for the benefit of the processor or producer;
>
> 4) the cost of such inspection should be paid out of the General Fund of the federal government, not only because such inspection is a proper charge against the people as a whole, but because it is the only way in which the consumer can be assured of effective, uncompromising inspection, in which they can repose the fullest confidence."
>
> Senate Report No. 1107, April 7, 1948, and House Report No. 1852, May 4, 1948 [to accompany Senate bill (S. 2256)]. The House Report repeats in substance the Senate Report. (See 1948 U.S. Code Cong. Service, p. 1706 at *1711)*

Thus the specific requirement of payment for samples taken by U.S.D.A. meat inspectors is founded upon

Congress' basic and explicit policy that the federal meat inspection service must be operated on federal funds.[7] The only exception is for overtime inspection to be paid for by industry and there are no other exceptions.

3. Statute 21 U.S.C. §680 authorizes appropriation for the payment of samples by the United States.

Congress directs the Secretary of Agriculture in 21 U.S.C. §680 as follows:

> "There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this section."

Since 21 U.S.C. §642 provides that U.S.D.A. inspectors can "take reasonable samples of their (meat processor's) inventory upon payment of the fair market value therefor", then under 21 U.S.C. §680 the Secretary of Agriculture is authorized to request appropri-

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[7]Incredibly enough, in light of the fact that this legislative history was specifically pointed out to the lower courts, the memorandum of decision states at xi of Appendix B:

> ". . . it is surprising that the legislative history of the 1967 Amendment to the Federal Meat Inspection Act adding 21 U.S.C. §642, is silent and shows no debate or comment upon the meaning or application of the language in §642 requiring payment for samples of 'inventory'."

Later the memorandum of decision states at xvi:

> "We are of the opinion that the constitutional power of Government to require such inspections for the protection of the public health and safety reasonably implies the right to take samples of products without payment for purposes of conducting such inspections, so long as the quantity of samples taken is not excessive and is reasonably necessary for the conduct of such inspection. If it were otherwise, the USDA's ability to perform its inspection duties, and, accordingly, its ability to protect the public from unwholesome and adulterated meat, would be contingent upon the size of its administrative budget."

ations for the payment of these samples.[8] The Secretary of Agriculture should comply with 21 U.S.C. §642 and congressional policy that the federal government will pay for meat samples to promote "uncompromising inspection" for the benefit of the meat industry and the consumer.[9]

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[8]Memorandum of decision states at xi of Appendix B:

"It is also significant that Congress has never appropriated . . . any funds in the USDA's budget for payment of samples taken in the course of inspections under 21 U.S.C. §606 . . .

Memorandum of decision further states at xvi:

. . . Requiring Chip Steak to yield samples of its products for inspection purposes is, in our view, no more a violation of due process than is the requirement, contained in USDA regulation 9 CFR 307.2, that Chip Steak provide, without reimbursement, light, tables, benches, receptacles, soaps, retention rooms, lockers for inspection tags, and other facilities for use by USDA inspectors."

Incidentally, footnote 6 of the memorandum of decision at ix does recommend receipts for the taking of samples which has not been instigated by USDA to date:

"The issue of whether the USDA should be required to give receipts for samples taken is not before this court. However, without determining whether there is any such legal requirement, it seems reasonable to expect that the USDA would, at least as a matter of courtesy and good practice, give notice of and receipts for samples taken in the course of inspection."

[9]The memorandum of decision states at ix at Appendix B:

". . . [Petitioners] indicate that their reason for pressing the issue is to obtain records of and receipts for samples taken by USDA in the course of inspection, implying that such record keeping would serve as a deterrent to the bribery of USDA meat inspectors."

Petitioner did indeed make such an implication. He informed the court of a recent article entitled "The Curious Case of the Indicted Meat Inspectors," *Harper's*, September 1972, at p. 82, which tells how, at present, the taking of samples without payment can stand in the way of "uncompromising inspection":

"The practice is called 'cumshaw'—accepting small amounts of product for one's own use at home. [USDA Meat] Inspectors argue that the pressure to conform to the practice begins from the first day on the job, and comes almost as much from other inspectors as from packers. 'We are weaned on the tradition'. The old-timers always say, 'It isn't a good inspector who pays for his Sunday dinner.' 'They tell you that everybody else does it and has always done it, that it

B. REGULATION 9 CFR 318.9 IS UNCONSTITUTIONAL BECAUSE IT AUTHORIZES MEAT INSPECTORS OF THE U.S. DEPARTMENT OF AGRICULTURE TO TAKE SAMPLES WITHOUT PAYMENT TO OWNERS IN VIOLATION OF 21 U.S.C. §642(a), §695 AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

There is no provision in the Meat Inspection Act authorizing regulation 9 CFR 318.9 which reads:

> "Samples of products, water, dyes, chemicals, preservatives, spices, or other articles in any official establishment shall be taken, without cost to the [Meat Inspection] Program [of USDA's Consumer and Marketing Service], for examination, as often as may be deemed necessary for the efficient conduct of the inspection."

To the contrary, regulation 9 CFR 318.9 violates both 21 USC §642(a) and §695 which required payment for samples, and the Fifth Amendment of the Federal Constitution:

> "No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation."

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has nothing to do with doing your duty, and that if you don't take it, someone else will. I figure the job is hard enough without having the other inspectors suspicious of you.' There are unwritten ground rules, moral strictures transmitted from inspector to inspector, and these too are impressed on the new recruit: 'Don't accept more meat than your family can use'; 'Don't solicit the meat from the packer'; and by far the most important, 'Don't let cumshaw influence your judgment or the way you do your job."

This article is based upon specific events reported in the *New York Times*, Friday, October 8, 1971, Section I, page 25, Cols. 1 and 2 bottom, and entitled "U.S. Indicts 40 [USDA] Meat Inspectors on Charges of Accepting Bribes." (C.R. 149).

Very recently, bribery of USDA meat inspectors with monies and meat was reported in *The Wall Street Journal*, Wednesday, March 20, 1974, page 34, Cols. 4, 5 & 6 top, and entitled "Five Meat Packers, 13 Persons Indicted on Bribery Charges".

In addition, payment for samples is historically recognized in public health legislation as a fundamental right of the owner.[10] Allowing the taking of any meat samples without payment under Regulation 9 CFR 318.9 should be declared unconstitutional and void.

CONCLUSION

Inescapably the specific issue raised by this petition is tied to a more fundamental issue: shall government officials continue to be condoned in a policy of breaking the *law* and then "stonewalling it". Petitioners feel strongly that the courts must answer "no". For this, as well as for the reasons previously stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
November 15, 1974.

Respectfully submitted,
GEORGE ALEXANDER MCKRAY,
Attorney for Petitioners.

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[10] "Public Health Law Manual" by Frank Grad (Third Printing, 1973), American Public Health Association, Inc., at pages 113-114, states:

> "The usual procedure to determine whether a shipment of food or drugs meets health standards is to collect samples from inspected lots. Statutes often provide that these may not simply be taken by the inspector, but that the purchase price or actual value must be paid to the owner of the lot from which samples were drawn." [Citations given in footnote.]

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Chip Steak Co., Inc. and Vao L. Cheney, as President, Plaintiffs-Appellants, vs. Earl A. Butz, Secretary of Agriculture, M. E. Christopherson, U.S.D.A. Regional Director, R. A. Moody, U.S.D.A. Deputy Director, R. E. Goertz, U.S.D.A. Officer in Charge of the San Francisco Circuit, Leon G. Broidy and A. J. English, U.S.D.A. Meat Inspectors, Defendants-Appellees.	No. 73-1776 OPINION

[September 23, 1974]

On Appeal from the United States District Court for the Northern District of California

Before: HAMLEY and DUNAWAY, Circuit Judges, and NEILL,* District Judge.

PER CURIAM:

The judgment is affirmed for the reasons stated in the opinion of the district court, reported in 353 F. Supp. 438 (N.D. Cal. 1973).

*The Honorable Marshall A. Neill, United States District Judge for the Eastern District of Washington, sitting by designation.

Appendix B

United States District Court
Northern District of California

No. 71 49

Chip Steak, Inc., et al.,
Plaintiffs,
vs.
Clifford Hardin, Secretary of Agriculture, et al.,
Defendants.

[Filed Jan. 30, 1973]

MEMORANDUM OF DECISION

SWEIGERT, J.

This is an action by Chip Steak Co., Inc. ("Chip Steak"), a California meat processing firm, and Vao L. Cheney, president of Chip Steak, involving two separate claims against officials of the United States Department of Agriculture ("USDA").

Under their first claim, plaintiffs seek a permanent injunction preventing USDA officials from taking samples of Chip Steak products without payment in the course of inspections conducted at Chip Steak's plant, and a declaratory judgment holding void and unenforceable USDA regulation 9 CFR 318.9, which provides, in effect, that USDA meat inspectors can take samples of meat products in the course of inspection without payment.

Second, plaintiffs seek a mandatory injunction compelling USDA officials to "retest" Chip Steak products that have been administratively detained by USDA under 21 U.S.C. § 672 on suspicion of having excessive fat content if the USDA's laboratory test results, showing excessive fat content, are contradicted by Chip Steak's own laboratory test results.

This action originally came before the court for hearing on plaintiffs' motion for a preliminary injunction. The initial hearing on that motion revealed only minor factual changes and no substantial claim of irreparable damage. We therefore continued the hearing on the preliminary injunction, and, invoking FRCP 65(a)(2), advanced trial on the merits to be consolidated with that hearing.

At trial, both parties submitted evidence by oral testimony and affidavits.[1] The action is therefore ready for final adjudication on the merits of plaintiffs' two claims, which we shall consider separately.

Payment for Samples Issue

Plaintiff Chip Steak is a California corporation in the business of manufacturing processed meat food products at its plant in Oakland, California. The record shows that Chip Steak conducts business by buying boned meat from slaughterers or wholesalers, which it then cuts, grinds, prepares and otherwise processes, freezes and packages into small portions,

[1]Upon stipulation of the parties, the affidavits and other evidentiary materials filed in connection with plaintiffs' motion for a preliminary injunction were admitted in evidence at trial.

and then sells to meat food product wholesalers for distribution in the retail market.

The Federal Meat Inspection Act requires, in Subchapter I, that, prior to entering Chip Steak's plant, the meat used by it to prepare its meat food products must have undergone USDA ante-mortem and post-mortem inspection to insure that the meat is not "adulterated" within the meaning of the Act and the regulations promulgated thereunder.[2]

In addition to the foregoing inspections, Subchapter I of the Act also requires, in 21 U.S.C. § 606, that

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[2]21 U.S.C. §603 provides, in pertinent part, that "For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, goats, horses, mules, and other equines before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; . . ."

21 U.S.C. §604 provides, in pertinent part, that "For the purposes set forth in section 603 of this title the Secretary shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, goats, horses, mules, and other equines to be prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment . . . as articles of commerce which are capable of use as human food; and the carcasses and parts thereof of all such animals found to be not adulterated shall be marked, stamped, tagged or labeled as 'Inspected and passed;' and said inspectors shall label, mark, stamp, or tag as 'Inspected and condemned' all carcasses and parts thereof found to be adulterated; . . ."

21 U.S.C. §605 provides, in pertinent part, that "The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, goats, horses, mules and other equines, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering or similar establishment and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; . . ."

meat food products, such as those prepared by Chip Steak, must themselves undergo USDA inspection at Chip Steak's plant to insure that these meat food products are not "adulterated" within the meaning of the Act and USDA regulations. That provision, which has remained substantially unchanged since its enactment in 1907,[3] provides, in pertinent part, as follows:

> "For the purposes hereinbefore set forth the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as 'Inspected and passed' all such products found to be not adulterated; and said inspectors shall label, mark stamp, or tag as 'Inspected and condemned' all such products found adulterated, . . ."

The record shows that it has been the USDA's long standing practice to take samples of meat food products without payment for purposes of conducting the inspection required under 21 U.S.C. § 606, supra. (McEnroe Affidavit, filed December 14, 1971). This practice has been formalized in USDA regulation 9 CFR 318.9, providing that:

> "Samples of products, water, dyes, chemicals, preservatives, spices, or other articles in any official

[3]See, Historical Note to 21 U.S.C. § 606.

establishment shall be taken, without cost to the [Meat Inspection Program of USDA's Consumer and Marketing Service], for examination, as often as may be deemed necessary for the efficient conduct of the inspection."

In 1967, Congress amended the Federal Meat Inspection Act in several respects, including the addition of a new provision in Subchapter II of the Act, 21 U.S.C. § 642(a), which provides, in effect, that the specified categories of meat businesses set forth therein must maintain accurate records reflecting their business dealings, and that the USDA has the authority to inspect the facilities, records and inventory of such businesses, and, ". . . to take reasonable samples of their inventory upon payment therefor."[4]

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[4] 21 U.S.C. § 642(a), in its entirety, provides as follows:

"(a) The following classes of persons, firms, and corporations shall keep such records as will fully and correctly disclose all transactions involved in their businesses; and all persons, firms, and persons subject to such requirements shall, at all reasonable times, upon notice by a duly authorized representative of the Secretary, afford such representative access to their places of business and opportunity to examine the facilities, inventory, and records thereof, to copy all such records, and to take reasonable samples of their inventory upon payment of the fair market value therefor—

(1) Any persons, firms, or corporations that engage, for commerce, in the business of slaughtering any cattle, sheep, swine, goats, horses, mules, or other equines, or preparing, freezing, packaging, or labeling any carcasses, or parts or products of carcasses, of any such animals, for use as human food or animal food;

(2) Any persons, firms, or corporations that engage in the business of buying or selling (as meat brokers, wholesalers or otherwise), or transporting in commerce, or storing in or for commerce, or importing, any carcasses, or parts or products of carcasses, of any such animals;

(3) Any persons, firms, or corporations that engage in business, in or for commerce, as renderers, or engage in the business of buying, selling, or transporting, in commerce,

The USDA has implemented the new authority to conduct inspections provided in this provision in regulation 9 CFR 320.4, which almost verbatim adopts the language contained in the statute.[5]

The record here shows that on January 19, 1971, a USDA meat inspector assigned to Chip Steak's plant for the purpose of conducting the inspection required under 21 U.S.C. § 606, supra, took some samples of a Chip Steak product known as "Randy's Buttered Beef Steaks" in the course of such an inspection. (See, Cheney Affidavit, filed October 15, 1971). When the samples were taken, the product was still on the production line and had not yet been marked with an official inspection legend indicating that it had been "inspected and passed" pursuant to 21 U.S.C. § 606, supra. (See Trial Transcript, pp. 59 and 75). The purpose of the sampling was to deter-

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or importing, any dead, dying, disabled, or diseased cattle, sheep, swine, goats, horses, mules, or other equines, or parts of the carcasses of any such animals that died otherwise than by slaughter."

[5]Regulation 9 CFR 320.4 provides as follows:

"Every person (including every firm or corporation) within any of the classes specified in § 320.1 shall upon the presentation of official credentials by any duly authorized representative of the Secretary, during ordinary business hours, permit such representative to enter his or its place of business and examine the records required to be kept by § 320.1 and the facilities and inventory pertaining to the business of such person subject to the Act, and to copy all such records and to take reasonable samples of the inventory upon payment of the fair market value therefor. Any necessary facilities (other than reproduction equipment) for such examination and copy of records and for such examination and sampling of inventory shall be afforded to such authorized representative of the Secretary."

mine whether the fat content of the product was such so as to render it adulterated within the meaning of USDA regulations. (Cheney Affidavit, supra).

Some time after the above occurrence, plaintiff Cheney made a formal demand that the USDA pay the fair market value of these samples, alleged to be somewhere in excess of one dollar, on the grounds that such payment was required under 21 U.S.C. § 642(a), supra. (Id.) The USDA, through its Regional Director of the Consumer and Marketing Service, E. M. Christopherson, responded by letter to the effect that it would not pay for the samples in question and would continue to take samples of Chip Steak products "in the usual manner." (Id.)

At trial, plaintiff Cheney testified that Chip Steak processes an average of 230,000 pounds of meat per month, resulting in annual gross sales of approximately $2,000,000. He testified further that USDA inspectors, in conducting inspections at Chip Steak's plant, take as samples approximately ten to fifteen pounds (valued at $10) of Chip Steak's products per month.

On the basis of the foregoing record, plaintiffs contend that the USDA's practice of taking samples without payment and the regulation, 9 CFR 318.9, supra, allowing such taking without payment, are unlawful and in conflict with the following language contained in 21 U.S.C. § 642, supra:

> ". . . and to take reasonable samples of their inventory upon payment of the fair market value therefor—"

Plaintiffs contend that the above language requires the USDA to pay for all samples taken in the course of USDA inspections conducted at the Chip Steak plant. They make the further contention that regulation 9 CFR 318.9 is unconstitutional.

Plaintiffs admit, however, that their purpose in seeking to compel payment for samples taken by USDA is "not financial at all" and that "Chip Steak Co. might well turn down offers of payment for samples"; they indicate that their reason for pressing the issue is to obtain records of and receipts for samples taken by USDA in the course of inspection, implying that such record keeping would serve as a deterrent to the bribery of USDA meat inspectors. (See, Plaintiffs' Reply Memorandum, filed December 30, 1971, at p. 4).[6]

Defendants contend, in opposition, that the language in 21 U.S.C. § 642, relied upon by plaintiffs, does not apply to samples taken in the course of inspections conducted under 21 U.S.C. § 606, nor to other inspections authorized under Subchapter I of the Act for the purpose of preventing adulterated meat from entering commerce. They take the position that Congress enacted § 642, not to change any existing practice of the USDA under § 606, but to give

[6]The issue of whether the USDA should be required to give receipts for samples taken is not before this court. However, without determining whether there is any such legal requirement, it seems reasonable to expect that the USDA would, at least as a matter of courtesy and good practice, give notice of and receipts for samples taken in the course of inspection.

the USDA new and broader authority, in addition to that conferred under the provisions in Subchapter I of the Act, to require accurate record keeping by a broad spectrum of regulated meat businesses, and to permit USDA inspection of the facilities, records, and inventory, and sampling of the inventory, of such businesses, in furtherance of that purpose. The requirement of payment for samples contained in § 642, defendants contend, applies only to samples of "inventory" taken in the course of inspections under § 642.

The issue presented is essentially one of statutory construction: whether Congress, in enacting § 642, intended the language contained therein requiring payment for samples of "inventory" to apply to USDA sampling of meat food products in the course of inspections under 21 U.S.C. § 606.

We begin our discussion of this question by noting again that it has been the long standing practice of the USDA to take samples of meat food products without payment in the course of inspections conducted under authority of 21 U.S.C. § 606; USDA, in promulgating 9 CFR 318.9, supra, has interpreted the language of § 642 requiring payment for samples of "inventory" as *not* being applicable to samples of products taken during inspections conducted under 21 U.S.C. § 606. This is significant. As noted by one authority in the field of administrative law, "... courts give extra authoritative weight to interpretative rules and practices which . . . have been consistently followed over a long period." See, Davis, *Admin. Law Treatise,* § 5.06 at p. 324 (1958).

Furthermore, we have here a situation where, if plaintiffs are correct in their contention that § 642 requires payment for samples of products taken during inspections under § 606, the result would be to require that USDA to bear the cumulative expense of paying for all samples taken in the course of routine inspections at all establishments subject to § 606 of the Act. Given this possible result, it is surprising that the legislative history of the 1967 Amendment to the Federal Meat Inspection Act adding 21 U.S.C. § 642, is silent and shows no debate or comment upon the meaning or application of the language in § 642 requiring payment for samples of "inventory." It is also significant that Congress has never appropriated any funds in the USDA's budget for payment of samples taken in the course of inspections under 21 U.S.C. § 606. (See Affidavit of Christopherson, filed November 9, 1971).

Although the foregoing circumstances are by no means conclusive, they do suggest that Congress did not envision § 642 as having the broad application that plaintiffs seek to attribute to it.

Obvious differences in the nature of the respective inspections authorized under the two provisions in issue, 21 U.S.C. §§ 606 and 642, pointed out by defendants, lend further support to the conclusion that Congress, in enacting § 642, did not intend the payment requirement in § 642 to apply to inspections conducted under authority of § 606.

Section 606, when read together with related provisions contained in Subchapter I of the Act (e.g.,

§§ 603, 604 and 605, supra, at n. 2), is clearly part of a regulatory scheme, contained in Subchapter I, intended by Congress to prevent the use in commerce of adulterated meat food products. That provision is couched in mandatory terms and in effect imposes a duty upon the USDA to provide inspections for adulteration:

> "For the purposes hereinbefore set forth the Secretary *shall cause to be made* by inspectors appointed for that purpose, an examination and inspection of all meat food products . . ." (emphasis added) 21 U.S.C. § 606

These inspections are to be carried out by "inspectors" appointed by the Secretary of Agriculture for that specific purpose. They can occur, without prior notice, ". . . at all times, by day or night, whether the establishment be operated or not . . ." 21 U.S.C. § 606

A reading of § 642, on the other hand, suggests that its purpose is to insure accurate record keeping by the various meat enterprises encompassed by it. Section 642, unlike § 606, does not grant the authority to conduct inspections in mandatory terms. Also, inspections under § 642 are to be conducted by a "duly authorized representative of the Secretary," must be conducted on notice, and can be conducted only at "reasonable times."

In addition to the foregoing distinctions, inspections under sections 606 and 642 differ in that they are directed at different objects and apply to different, although overlapping, phases of the meat busi-

ness. Section 606 authorizes inspection of "meat food *products*" prepared in any "slaughtering, meat-canning, salting, packing, rendering, or similar establishment. . . ." Section 642, on the other hand, allows inspection of "facilities, inventory, and records" of a much broader segment of the meat industry. (emphasis added).

As indicated by defendants, the key to distinguishing inspections under sections 606 and 642 lies in the meaning of the term "inventory" as it is used in section 642.

The term "inventory" is defined neither in the statute nor in USDA regulations. We can reasonably assume, however, that Congress used the term having in mind its plain, ordinary meaning in the context of an on-going business: i.e., stock in trade available for sale in the ordinary course of business. See, generally, 48 C.J.S. at p. 756, citing *Olson Equip. Co. v. Minneapolis,* 171 N.W.2d 717, 718 (Minn., 1969); *Forrester v. Americus Oil Co.,* 19 S.E.2d 328, 330 (Ga., 1942).

The Act, in 21 U.S.C. §610 (b) makes unlawful the sale or transportation, or offer for sale or transportation, of meat food products unless they have been "inspected and passed" as not being adulterated under 21 U.S.C. § 606. Under the above meaning of the term, therefore, a meat food product cannot become "inventory" unless it has been so "inspected and passed."

It follows, therefore, that the requirement, contained in § 642, that USDA pay fair market value

for samples of "inventory" does not apply to samples taken of meat food products that have not yet been "inspected and passed" under 21 U.S.C. § 606. Such an interpretation makes sense when one considers the task involved in attempting to assign a "fair market value" to samples of a product that has not yet been "inspected and passed" and is therefore not yet marketable.

As applied to Chip Steak, then, the requirement of payment for samples under § 642 covers only samples taken of Chip Steak products that have undergone inspection under 21 U.S.C. § 606, have been marked "inspected and passed" as not being adulterated, and are ready for release into commerce.

We find, therefore, that 21 U.S.C. § 642 does not prevent the USDA from taking, without payment, reasonable samples of meat food products at Chip Steak's plant in the course of inspections conducted under 21 U.S.C. § 606 for the purpose of determining whether the products can properly be labeled "inspected and passed" as not being adulterated. We find also that regulation 9 CFR 318.9, insofar as it allows the USDA to take samples, without payment, under the foregoing circumstances, constitutes a reasonable interpretation by USDA of its statutory authority and is not unlawful.

Plaintiffs also make the general contention that regulation 9 CFR 318.9, supra, is unconstitutional. Although nowhere in the record before this court do plaintiffs set forth the precise basis for their claim of unconstitutionality, plaintiffs apparently contend

that the USDA's taking of samples without payment constitutes a deprivation of property without due process of law.

Plaintiffs' admission, noted above, that their primary interest in litigating this issue is not "financial at all," and, that they mght turn down payment for samples if offered, provides a questionable set of facts upon which to ask this court to declare unconstitutional a longstanding federal agency practice.

Assuming, however, that the issue is properly presented here, we nevertheless conclude that the USDA's taking, without payment, of reasonable samples of meat food products in the course of routine inspections authorized under 21 U.S.C. § 606, does not violate the due process clause, so long as the sampling is not excessive and is reasonably necessary for the conduct of such inspection.

Congress has found, in 21 U.S.C. § 602, that meat and food products are an important source of the Nation's food supply, that they are consumed throughout the Nation and the major portion thereof moves through interstate commerce, and "that it is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." In furtherance of this purpose, Congress has enacted in Subchapter I of the Act a regulatory scheme requiring the USDA to conduct inspections of meat and meat food products before they are allowed to enter commerce.

There is no dispute here as to the constitutional power of the Government to require such inspection for the protection of the public health and safety.

We are of the opinion that the constitutional power of Government to require such inspections for the protection of the public health and safety reasonably implies the right to take samples of products without payment for purposes of conducting such inspections, so long as the quantity of samples taken is not excessive and is reasonably necessary for the conduct of such inspection. If it were otherwise, the USDA's ability to perform its inspection duties, and, accordingly, its ability to protect the public from unwholesome and adulterated meat, would be contingent upon the size of its administrative budget.

There is no allegation here that USDA's sampling is excessive or unreasonable. In fact, the record here shows such an insignificant impact on Chip Steak's overall financial situation, that the taking involved here could be characterized as being de minimis. Requiring Chip Steak to yield samples of its products for inspection purposes is, in our view, no more a violation of due process than is the requirement, contained in USDA regulation 9 CFR 307.2, that Chip Steak provide, without reimbursement, light, tables, benches, receptacles, soaps, retention rooms, lockers for inspection tags, and other facilities for use by USDA inspectors.

Accordingly, plaintiffs' application for a permanent injunction and for a declaratory judgment holding

regulation 9 CFR 318.9 to be void and unenforceable should be, and the same is hereby, denied.

"Retesting" Issue

The Federal Meat Inspection Act, in 21 U.S.C. § 672, authorizes the USDA to administratively detain meat food products that are reasonably believed to be adulterated. The record here shows that on September 1, 1970, USDA officials administratively detained approximately 747 pounds of plaintiffs' beef steaks on the grounds that USDA laboratory tests conducted on samples of the product indicated a fat content of 35%, the maximum permitted under USDA regulation 9 CFR 319.5(d) being 30%. Chip Steak later took its own samples of the detained product and conducted its own laboratory tests, which indicated that the product contained only 27% fat. The USDA later retested the product, found it to contain only 27.1% fat, and released it to Chip Steak.

On the basis of the foregoing record, plaintiffs ask this court to enter an order requiring the USDA to "retest" products that have been administratively detained by it under 21 U.S.C. § 672, where Chip Steak's laboratory test results as to the fat content of the product are in conflict with USDA test results.[7] Plaintiffs cite no statutory, regulatory or other au-

[7]Plaintiffs originally contended that the USDA refused to allow plaintiffs to take samples of administratively detained products, but have now abandoned that contention, conceding that USDA now permits them to take such samples. (Plaintiffs' reply memorandum, filed December 30, 1971, at p. 1; see, also, affidavit of Cheney, filed December 30, 1971.)

thority in support of their demand, but argue simply that the imposition of such a requirement would prevent a multiplicity of lawsuits and would avoid unnecessary public embarrassment to Chip Steak resulting from unwarranted administrative detentions of its products.

It appears to us that plaintiffs' claim is moot by virtue of the fact that the USDA did in fact retest and release the detained meat here in question. Moreover, there is nothing in the record to show that the USDA, as a matter of policy, refuses to retest detained Chip Steak products if Chip Steak findings as to fat content are shown to be in conflict with USDA's findings. In fact, the record shows that, if a discrepancy in test results should arise, USDA does, under present USDA policy, allow Chip Steak to resample the detained product and to have the new samples tested at a USDA-approved laboratory. (Affidavit of Houston, filed January 27, 1972, at p. 4).

Even assuming that USDA does, as a matter of policy, refuse to retest Chip Steak products that have been detained where Chip Steak's tests indicates a discrepancy as to fat content, plaintiffs still cannot prevail.

The record here shows that, whereas the official USDA test for fat content of products is by the so-called "alcohol" extraction process, Chip Steak utilizes and is relying in this case on tests conducted by the "Needham" or "heat extraction" process, which is not recognized by USDA as a valid test. (Trial Tran-

script, pp. 85-92). Given these circumstances, it is frivolous for plaintiffs to argue that, when their tests as to fat content contradict USDA's findings, the USDA should be required to retest the detained article.

Accordingly, it is the order of this court that:

(1) Plaintiffs' motion for an amendment of the complaint to conform to proof, filed February 28, 1972, should be, and the same is hereby, granted;

(2) Plaintiffs' application for a permanent injunction requiring the USDA to "retest" detained products under the circumstances outlined above should be, and the same is hereby, denied.

Dated: January 30, 1973.

/s/ W. T. Sweigert
W. T. Sweigert
United States District Judge